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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 107

OLD MISSION PORTLAND CEMENT COMPANY, A CORPORATION, petitioner

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 77–90) is reported in 25 B. T. A. 305. The opinion of the Circuit Court of Appeals (R. 341–355) is reported in 69 F. (2d) 676.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 12, 1934 (R. 355–356). The petition for writ of certiorari was filed June 12,

1934. Jurisdiction is conferred on this Court by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. Certiorari was granted October 8, 1934, limited to the question of the right of taxpayer to deductions (a) on account of amortization of bond discount, and (b) on account of contributions to the San Francisco Community Chest.

QUESTIONS PRESENTED

1. Whether the amortization of the discount on bonds issued prior to March 1, 1913, by a corporation, one of an affiliated group, and owned by the taxpayer, a member of the same group, should be deducted in computing the consolidated net income of the affiliated companies for the years 1923 to 1926, inclusive.

2. Whether the petitioner may deduct as ordinary and necessary expenses, donations to the San Francisco Community Chest.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra,* pp. 14–21.

STATEMENT

The facts found by the Board pertinent to the above issues may be summarized as follows: During the taxable years 1923 to 1926, inclusive, the taxpayer was affiliated with the California Central Railroad Company and the San Juan Pacific Railway Company, and for each of these years the three

corporations filed consolidated income tax returns. The books of the affiliated companies were kept and the consolidated returns were filed on the accrual basis (R. 76).

In 1912 the California Central Railroad Company issued its bonds at a discount. At some indefinite time the taxpayer acquired a portion of these bonds. In computing the consolidated net income the Commissioner disallowed as deductions amounts representing the amortized discount applicable to the portion of the bonds owned by the taxpayer (R. 76–77). The taxpayer contributed $1,000 in each of the years 1923 to 1926, inclusive, to the San Francisco Community Chest.

The amortized bond discount and the contributions were claimed by taxpayer as deductions and were disallowed by the Commissioner.

The Board of Tax Appeals sustained the Commissioner as to both of the above items and the Circuit Court of Appeals approved the Board's determination.

SUMMARY OF ARGUMENT

1. Amortized discount on the bonds of one of an affiliated group of corporations is not deductible where the bonds are owned by another member of the same group. There is an intercompany transaction and the item should be eliminated in deriving the taxable net income of the united group.

2. Congress considered and rejected a provision permitting corporations to deduct contributions as

such. The Regulation permitting the deduction within the limits therein provided is reasonable, not in conflict with the law, and has received legislative sanction by several reenactments of the law without change. Donations are deductible by corporations only as ordinary *and* necessary expenses. Their deductibility rests upon the facts of each individual case. The record does not show that the donations involved were directly connected with taxpayer's business; that they reasonably bore any relationship to the ordinary scope of the business; that they were made for purposes connected with the operation of the business; that the donee organization was conducted for the benefit of the taxpayer's employees; nor that the donations represented a consideration for benefits flowing directly to the taxpayer. The record does contain evidence that the purpose of the donations was charitable. The Commissioner's ruling has the support of the presumption of correctness which is not outweighed by the evidence.

ARGUMENT

I

In 1912 taxpayer's affiliate issued $320,000 par value of its bonds at a discount of $135,247.40 (R. 42). A portion of these bonds was owned by the taxpayer in the years 1923 to 1926, inclusive. It is on this portion of the bonds that the amortization of discount has been disallowed. Unless there be a provision in the Act or Regulations that fairly

may be read to authorize it, the deduction claimed is not allowable. *Ilfeld Co.* v. *Hernandez,* 292 U. S. 62.

Article 636 of Regulations 62 and 65, *infra,* pp. 18, 20, and Article 635 of Regulations 69, *infra,* p. 21, provides that intercompany transactions (whether or not resulting in any profit or loss to the separate corporations) are subject to elimination from the consolidated taxable net income of affiliated corporations.

The right of a taxpayer to deduct amortized discount over the life of bonds issued at a discount is not derived from express provision in the Revenue Acts, but is based upon Article 545 of Regulations 62, 65, and 69, *infra,* pp. 17, 19, 21. The Regulations being the source of that privilege may properly limit the circumstances under which the privilege may be exercised.

In the instant case one member of the affiliated group acquired the bonds of another. The Treasury Department has consistently considered such a transaction to be an intercompany transaction, and has consistently held that it should be eliminated from consolidated taxable net income. The Board of Tax Appeals and the courts have consistently upheld the Commissioner. *Gulf Mobile & Northern Railroad Co.* v. *Commissioner,* 22 B. T. A. 233, affirmed 71 F. (2d) 953 (App. D. C.); *New Orleans, Texas & Mexico Railway Co.* v. *Commissioner,* 6 B. T. A. 436; and the instant case. In

the absence of clear error or arbitrary action, the rulings should not be disturbed.

Petitioner contends that the item enters the computation of the income of one of the affiliated group but does not appear conversely in the income of another, and therefore it may not be considered an intercompany transaction. This argument is based upon a misconception of amortization. The bond discount for which deduction is claimed was not paid and did not accrue in any one of the years here involved. Amortization of that discount anticipates the payment by one and the receipt by the other of the face value of the bonds at maturity. If this intercompany transaction be not anticipated, there is no basis for the allowance of the amortized discount.

Furthermore, it is the clear intent of each of the Revenue Acts involved to compute consolidated net income as a unit, disregarding the separate corporate entities of the affiliated group. *Burnet* v. *Aluminum Goods Co.,* 287 U. S. 544; *Atlantic City Co.* v. *Commissioner,* 288 U. S. 152; *Commissioner* v. *Liberty Nat. Co.,* 58 F. (2d) 57 (C. C. A. 10th) certiorari denied, 287 U. S. 603; *Fidelity Nat. Bank & T. Co.* v. *Commissioner,* 39 F. (2d) 58 (C. C. A. 8th); *Gould Coupler Co.* v. *Commissioner,* 5 B. T. A. 499.

Affiliation occurs when the corporations are substantially owned or controlled by the same interests. Where consolidated returns are filed, the object is to ascertain the net income of those interests. The

acquisition by one of the consolidated group of the bonds of another of that same group, is the acquisition of the bonds by the unit. The unit both owns and owes the obligation. To permit the deduction claimed here would be to allow the amortization of an expense or loss which to the united group is neither immediate nor prospective. We submit that such is not only against the purport of the Treasury Regulations but is also contrary to the clear intent of the statutes.

In addition to the above we submit that as the bonds were issued prior to March 1, 1913, the discount claimed as a deduction is not allowable for the reasons advanced in the Commissioner's brief filed in the case of *Helvering* v. *Union Pacific Railroad Co.*, No. 51, now pending before this Court. A copy of this brief will be served on the taxpayer.

II

The donations to the San Francisco Community Chest are not deductible as charitable contributions. While the Revenue Acts permit individuals to deduct such donations, they contain no provision granting a like privilege to corporations. In fact, the matter was considered and voted down by Congress during the passage of the Revenue Act of 1918. Cong. Rec. (House) Vol. 56, Part 10, pp. 10426–10428.

The United States Court of Claims has held that donations are not deductible by corporations even

as ordinary and necessary expenses. *Con. Gas, Elec. Light & Power Co.* v. *United States,* 65 C. Cls. 252, wherein the court said (pp. 258, 259):

> But the deductions of "ordinary and necessary expenses" are applicable to both individuals and corporations, and if the deduction now urged is allowable it is singular that a deduction of charitable gifts is allowable to individuals and is not even mentioned in case of corporations. * * *

The above decision was followed in *Alfred J. Sweet (Inc.)* v. *United States,* 66 C. Cls. 654.

Article 562 of Regulations 62, 65, and 69, *infra,* pp. 17, 19, 21, provides that donations which legitimately represent a consideration for a benefit flowing directly to a corporation as an incident of its business are allowable deductions as ordinary and necessary expenses. Article 562 of Regulations 45 relating to the Revenue Act of 1918 contains substantially the same provision. Since this provision has been in effect under several Revenue Acts reenacted without change, it has the force of law. *McCaughn* v. *Hershey Chocolate Co.,* 283 U. S. 488; *Mass. Mutual Life Ins. Co.* v. *United States,* 288 U. S. 269. Furthermore, the Regulation should be given effect as it is reasonable and not inconsistent with the provisions of the statutes. *Universal Battery Co.* v. *United States,* 281 U. S. 580.

There are numerous cases in the Federal courts and the Board of Tax Appeals which deal with this question. They all, excepting the Court of

Claims decisions, *supra,* take the view that donations are deductible under Section 234 (a) (1) of the Revenue Acts of 1921, 1924, and 1926, *infra,* pp. 14, 15, 16, if they be ordinary and necessary expenses which come within the limits of Article 562 of Regulations 62, 65, and 69, *infra.* Many of these cases were considered by this Court in reaching its decision in *Welch* v. *Helvering,* 290 U. S. 111, wherein it was said (p. 116):

> To attempt to harmonize them would be a futile task. They involve the appreciation of particular situations, at times with border line conclusions. * * *

The *Welch* case involved the deductibility, as ordinary and necessary expenses, of payments made by an individual to the creditors of a bankrupt corporation. The deductibility of donations was not involved in that case and therefore Article 562 of the above Regulations was not considered.

Expenses to be deductible must be both "ordinary and necessary." *Welch* v. *Helvering, supra.* A donation is an ordinary and necessary expense when it represents "a consideration for a benefit flowing directly to the corporation as an incident to its business." In *American Rolling Mills Co.* v. *Commissioner,* 41 F. (2d) 314 (C. C. A. 6th), the court said (p. 315):

> The question always is whether balancing the outlay against the benefits to be reasonably expected, the business interest of the taxpayer would be advanced. * * *

All decisions are in accord that each case rests upon the facts of that individual case. To the facts in the instant case the Commissioner of Internal Revenue has applied the above standard. His ruling has the support of a presumption of correctness, and the petitioner has the burden of proving it to be wrong. *Welch* v. *Helvering, supra; Wickwire* v. *Reinecke,* 275 U. S. 101; *Jones* v. *Commissioner,* 38 F. (2d) 550, 552 (C. C. A. 7th). The Commissioner has been sustained by the Board of Tax Appeals, before whom the evidence was adduced.

The evidence on this question offered by the taxpayer was the testimony of the witnesses, Herbert Coffman (R. 171–174) and F. S. Richards (R. 266–267). Mr. Coffman testified that the contributions were practically a necessity; that the contributions were published; and that if the taxpayer was not on the list it would be put to quite a bit of annoyance by people "wanting to know what was the trouble" (R. 172). He also testified that he was not an officer of the taxpayer and was not consulted about the donations (R. 174). Mr. Richards testified as follows (R. 266–267):

> The next item is "Community Chest, $1,000.00." San Francisco, like many of the other cities of the country, maintained a Community Chest fund, which is practically an assessment upon the industry and those who are capable of giving it. If we do not contribute, we are placarded; we are

blacklisted, so far as publications are concerned. Every Community Chest contribution of any size is listed in the daily papers as it comes in. From the standpoint from which I look at those things and which I am certain the company looks at them, because I know most of the men making up the company, they feel that the welfare of the community is taken care of—the needs of the community, the extreme needs of the community, are taken care of—by the Community Chest, and they are just as much a part of our general expenses or demands upon the corporation as are those things which may come directly as a labor charge upon our books. I believe today that most of us have begun to believe that we are our brother's keeper to a certain extent, and the Community Chest of San Francisco takes care of those things which we as individuals have no time to take care of, and which would go undone were it not for these community organizations. Boys' Clubs; my own personal contact with the Community Chest in San Francisco was in 1923. Before I went to San Francisco to live I came in contact with the Columbia Park Boys' Club [263], an organization of boys which had made their way for many years, traveling around the world many times with a band, paying their way, really an educational institution which was living on charity. Out of that organization have come some of the prominent musicians of the country.

> Later I came in contact, through that organization, with amateur politics, and I feel certain that any community which does not do what the Community Chest of San Francisco is doing is losing a wonderful opportunity.

The charitable purpose expressed by the latter witness clothes the donations with the characteristics of true gifts, and shears them of all pretense of expenses. The more laudable the motive, the less evidence of the expectation of returning benefit.

It should be remembered that Congress refused to allow corporations to deduct contributions as such; and that the Regulations allow their deduction by corporations only when they represent a consideration for a benefit flowing directly to the corporation as an incident to its business. The benefit must be direct. All charitable donations to some indeterminate extent may be considered indirectly beneficial as a factor in creating good will; but to allow their deduction under the guise of ordinary and necessary expenses would be to open the back door where the front door had been securely locked by Congress. Cong. Rec. (House) *supra.*

To classify the donations as ordinary expenses because they were "necessary" to prevent blacklisting would, as was said in *Welch* v. *Helvering, supra* (at p. 115), "open the door to many bizarre analogies." Such a definition of an ordinary expense may include ransom paid to effect the return

of a kidnapped corporate officer. It may well include all contributions made by corporations.

Taxpayer relies upon *Evening Star Newspaper Co.* v. *Commissioner,* 28 B. T. A. 762. The facts in the instant case are distinguishable from the facts in that case. Moreover, the Government has not accepted that decision and an appeal is now pending before the Circuit Court of Appeals for the Fourth Circuit.

The Board has recognized the fact that a donation to a Community Chest is not a proper deduction by a corporation unless there be sufficient evidence of a direct benefit to the donor corporation. *Capital Traction Co.* v. *Commissioner,* 27 B. T. A. 926. That case was appealed by the taxpayer to the United States Court of Appeals for the District of Columbia, where it was dismissed for want of prosecution by the taxpayer. *A. Harris & Co.* v. *Lucas,* 48 F. (2d) 187 (C. C. A. 5th), cited by the taxpayer, is in direct conflict with *Welch* v. *Helvering, supra.*

CONCLUSION

The decisions below should be affirmed.

Respectfully submitted.

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OCTOBER 1934.

APPENDIX

Revenue Act of 1921, c. 136, 42 Stat. 227, 254:

SEC. 234. (a) That in computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions:

(1) All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered, and including rentals or other payments required to be made as a condition to the continued use or possession of property to which the corporation has not taken or is not taking title, or in which it has no equity;

SEC. 240. (a) That corporations which are affiliated within the meaning of this section may, for any taxable year beginning on or after January 1, 1922, make separate returns or, under regulations prescribed by the Commissioner with the approval of the Secretary, make a consolidated return of net income for the purpose of this title, in which case the taxes thereunder shall be computed and determined upon the basis of such return. If return is made on either of such bases, all returns thereafter made shall be upon the same basis unless permission to change the basis is granted by the Commissioner.

(b) In any case in which a tax is assessed upon the basis of a consolidated return, the

total tax shall be computed in the first instance as a unit and shall then be assessed upon the respective affiliated corporations in such proportions as may be agreed upon among them, or, in the absence of any such agreement, then on the basis of the net income properly assignable to each. There shall be allowed in computing the income tax only one specific credit computed as provided in subdivision (b) of section 236.

(c) For the purpose of this section two or more domestic corporations shall be deemed to be affiliated (1) if one corporation owns directly or controls through closely affiliated interests or by a nominee or nominees substantially all the stock of the other or others, or (2) if substantially all the stock of two or more corporations is owned or controlled by the same interests.

Revenue Act of 1924, c. 234, 43 Stat. 253:

SEC. 234. (a) In computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions:

(1) All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered, and including rentals or other payments required to be made as a condition to the continued use or possession of property to which the corporation has not taken or is not taking title, or in which it has no equity; [U. S. C., Title 26, Sec. 986].

SEC. 240. (a) Corporations which are affiliated within the meaning of this section may, for any taxable year, make separate returns or, under regulations prescribed by the Commissioner with the approval of the

Secretary, make a consolidated return of net income for the purpose of this title, in which case the taxes thereunder shall be computed and determined upon the basis of such return. If return is made on either of such bases, all returns thereafter made shall be upon the same basis unless permission to change the basis is granted by the Commissioner.

(b) In any case in which a tax is assessed upon the basis of a consolidated return, the total tax shall be computed in the first instance as a unit and shall then be assessed upon the respective affiliated corporations in such proportions as may be agreed upon among them, or, in the absence of any such agreement, then on the basis of the net income properly assignable to each. There shall be allowed in computing the income tax only one specific credit computed as provided in subdivision (b) of section 236.

(c) For the purpose of this section two or more domestic corporations shall be deemed to be affiliated (1) if one corporation owns at least 95 per centum of the voting stock of the other or others, or (2) if at least 95 per centum of the voting stock of two or more corporations is owned by the same interests. A corporation organized under the China Trade Act, 1922, shall not be deemed to be affiliated with any other corporation within the meaning of this section. [U. S. C., Title 26, Sec. 993.]

Sections 234 (a) (1) (U. S. C. App., Title 26, Sec. 986) and 240 (a), (b), and (c) (U. S. C. App., Title 26, Sec. 993) of the Revenue Act of 1926, c. 27, 44 Stat. 9, are identical with the above-quoted provisions of the Revenue Act of 1924.

Treasury Regulations 62, promulgated under the Revenue Act of 1921:

ART. 545. *Sale and retirement of corporate bonds.*—* * *

* * * * *

(3) (*a*) If bonds are issued by a corporation at a discount, the net amount of such discount is deductible and should be prorated or amortized over the life of the bonds. (*b*) If thereafter the corporation purchases and retires any of such bonds at a price in excess of the issuing price plus any amount of discount already deducted, the excess of the purchase price over the issuing price plus any amount of discount already deducted (or over the face value minus any amount of discount not yet deducted) is a deductible expense for the taxable year. (*c*) If, however, the corporation purchases and retires any of such bonds at a price less than the issuing price plus any amount of discount already deducted, the excess of the issuing price plus any amount of discount already deducted (or of the face value minus any amount of discount not yet deducted) over the purchase price is gain or income for the taxable year.

ART. 562. *Donations.*—Corporations are not entitled to deduct from gross income charitable or other contributions which individuals may deduct under paragraph (11) of section 214 (a). Donations made by a corporation for purposes connected with the operation of its business, however, when limited to charitable institutions, hospitals, or educational institutions conducted for the benefit of its employees or their dependents, are a proper deduction as ordinary and necessary expenses. Donations which legitimately represent a consideration for a bene-

fit flowing directly to the corporation as an incident of its business are allowable deductions from gross income. For example, a street railway corporation may donate a sum of money to an organization intending to hold a convention in the city in which it operates, with the reasonable expectation that the holding of such convention will augment its income through a greater number of people using the cars. * * *

ART. 563. *Sale of capital stock, bonds, and capital assets.*—A corporation sustains no deductible loss from the sale of its capital stock. See article 543. If it sells its bonds at a discount, the amount of such discount is treated in the same way as interest paid, and if it retires its bonds at a price in excess of the issuing price, such excess may usually be deducted as expense. See articles 545 and 848. * * *

ART. 636. *Consolidated net income of affiliated corporations.*—Subject to the provisions covering the determination of taxable net income of separate corporations, and subject further to the elimination of intercompany transactions (whether or not resulting in any profit or loss to the separate corporations), the consolidated taxable net income shall be the combined net income of the several corporations consolidated. Only one specific credit of $2,000, as provided in section 236 (b) and article 591, shall be allowed the consolidated group, and this only in case the net income of the group does not exceed $25,000; but if such net income is more than $25,000, the tax imposed by section 230 shall not exceed the tax which would be payable if the $2,000 were allowed, plus the amount of the net income in excess of $25,000. In respect of the statement of gross income and deductions and the sev-

eral schedules required under Form 1120, a corporation filing a consolidated return is required to prepare and file such statements and schedules in columnar form to the end that the details of the items of gross income and deductions for each corporation included in the consolidation may be readily audited.

Treasury Regulations 65, promulgated under the Revenue Act of 1924:

ART. 545. *Sale and retirement of corporate bonds.*— * * *

* * * * *

(3) (a) If bonds are issued by a corporation at a discount, the net amount of such discount is deductible and should be prorated or amortized over the life of the bonds. * * *

ART. 562. *Donations.*—Corporations are not entitled to deduct from gross income contributions or gifts which individuals may deduct under paragraph (10) of section 214 (a). Donations made by a corporation for purposes connected with the operation of its business, however, when limited to charitable institutions, hospitals, or educational institutions conducted for the benefit of its employees or their dependents, are a proper deduction as ordinary and necessary expenses. Donations which legitimately represent a consideration for a benefit flowing directly to the corporation as an incident of its business are allowable deductions from gross income. For example, a street railway corporation may donate a sum of money to an organization intending to hold a convention in the city in which it operates, with the reasonable expectation that the holding of such convention will augment its income through a greater number of people using

the cars. Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising and contributions for campaign expenses, are not deductible from gross income.

ART. 563. *Sale of capital stock, bonds, and capital assets.*—A corporation sustains no deductible loss from the sale of its capital stock. See article 543. If it sells its bonds at a discount, the amount of such discount is treated in the same way as interest paid, and if it retires its bonds at a price in excess of the issuing price, such excess may usually be deducted as expense. See article 545. * * *

ART. 636. *Consolidated net income of affiliated corporations.*—Subject to the provisions covering the determination of taxable net income of separate corporations, and subject further to the elimination of intercompany transactions (whether or not resulting in any profit or loss to the separate corporations), the consolidated taxable net income shall be the combined net income of the several corporations consolidated. Only one specific credit of $2,000, as provided in section 236(b) and article 591, shall be allowed the consolidated group, and this only in case the net income of the group does not exceed $25,000; but if such net income is more than $25,000, the tax imposed by section 230 shall not exceed the tax which would be payable if the $2,000 credit were allowed, plus the amount of the net income in excess of $25,000. In respect of the statement of gross income and deductions and the several schedules required under Form 1120, a corporation filing a consolidated return is re-

quired to prepare and file such statements and schedules in columnar form to the end that the details of the items of gross income and deductions for each corporation included in the consolidation may be readily audited.

Treasury Regulations 69, promulgated under the Revenue Act of 1926: Articles 545, 562, 563, and 635 of Regulations 69 are substantially the same as Articles 545, 562, 563, and 636 of Regulations 65, above quoted.

U. S. GOVERNMENT PRINTING OFFICE: 1930

OPINION

SUPREME COURT OF THE UNITED STATES.

No. 107.—October Term, 1934.

Old Mission Portland Cement Company, Petitioner, *vs.* Guy T. Helvering, as Commissioner of Internal Revenue.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[December 3, 1934.]

Mr. Justice Stone delivered the opinion of the Court.

In this case certiorari was granted, 293 U. S. —, "limited to the question of the right of the taxpayer to deductions (a) on account of amortization of bond discount, and (b) on account of contributions to the San Francisco Community Chest."

During each of the years 1923 to 1926, inclusive, petitioner and two corporations affiliated with it filed consolidated income tax returns on the accrual basis. In each year one of the affiliated corporations deducted, from gross income, amortized discount allowed upon an issue of its bonds in 1912. In computing the taxable income to be assessed to petitioner, the parent corporation, under the applicable Revenue Acts of 1921 (c. 136, 42 Stat. 227), 1924 (c. 234, 43 Stat. 253) and 1926 (c. 27, 44 Stat. 9), the Commismissoner refused to allow the deduction of so much of the amortized discount as was applicable to bonds, issued by its affiliate, which petitioner had acquired by purchase. He also refused to allow credit for the contributions to the Community Chest as not an ordinary and necessary expense, deduction of which the statute permits. His action was sustained both by the Board of Tax Appeals, 25 B. T. A. 305, and the Court of Appeals for the Ninth Circuit, 69 F. (2d) 676.

1. It is no longer open to question that amortized bond discount may be deducted in the separate return of a single taxpayer. See No. 51, *Helvering* v. *Union Pacific Railroad Co.*, decided this day. But the Government insists that the deduction by one affiliate, in a consolidated return, of amortized discount upon its bonds, which are owned by another affiliate, involves an "intercompany transaction" which, under the applicable statutes and regulations,

must be eliminated from the computation of the tax in order to arrive at the true taxable income.

Section 240 of the Revenue Acts of 1921, 1924 and 1926 extends to affiliated corporate taxpayers the privilege of making a consolidated tax return, subject to such restrictions as may be imposed by treasury regulations. The purpose of the section was to provide a method of computing the tax upon the true net income of what is in practical effect a single business enterprise, with substantially common ownership, as though it were that of a single taxpayer, despite the fact that it is carried on by separate corporations whose tax would otherwise be independently computed. See *Burnet* v. *Aluminum Goods Manufacturing Co.*, 287 U. S. 544, 547; *Handy & Harman* v. *Burnet*, 284 U. S. 136, 140; *Atlantic City Electric Co.* v. *Commissioner*, 288 U. S. 152, 154; *Woolford Realty Co., Inc.* v. *Rose*, 286 U. S. 319; *Appeal of Gould Coupler Co.*, 5 B. T. A. 499, 514-516; cf. Treasury Regulations 62, Art. 636, under the 1921 Act; T. R. 65, Art. 636, under the 1924 Act; T. R. 69, Art. 635, under the 1926 Act.

Each of the regulations controlling consolidated returns, under the applicable Revenue Acts, directs that only one specific credit of $2,000, which § 236 (b) allows to each individual taxpayer, shall be allowed to the consolidated group, and provides that "subject to the provisions covering the determination of taxable net income of separate corporations, and subject further to the elimination of intercompany transactions (whether or not resulting in any profit or loss to the separate corporations), the consolidated taxable net income shall be the combined net income of the several corporations consolidated." It is by the elimination of intercompany transactions from the computation, in order to ascertain "the combined net income of the several corporations consolidated," that the purpose of the statute is effected. See *Burnet* v. *Aluminum Goods Manufacturing Co., supra*, 549, 550. The Government, having thus conferred upon groups of affiliated taxpayers the privilege of computing their tax as though they were a single taxpaying entity, it would require plain language in statute and regulations to support the conclusion that it was also intended that they should retain the advantages which, before affiliation, attached peculiarly to their status as independent tax computing entities. The regulations are aimed at the prevention of a double advantage, to be secured only if affiliated taxpayers are allowed

to treat themselves, at the same moment, as one or many, according to their convenience for purposes of tax computation.

Amortized bond discount is deductible from the taxpayer's gross income only by way of anticipation of payment of the bonds at maturity. It is then that the taxpayer pays the difference, between the amount realized upon the sale of the bonds and their par value, which is the subject of the amortization. *Helvering* v. *Union Pacific Railroad Company, supra.* Here the payment anticipated is from one affiliate to another, an intercompany transaction. If we eliminate it from the computation of income upon the consolidated return, as the regulation directs, there is no anticipated payment of the discount to be amortized and no basis for the deduction.

A single taxpayer who had purchased his own bonds before maturity could not afterwards deduct, from gross income, the amortized discount on the bonds, in anticipation of their payment at maturity. This is equally the case where the obligor and obligee are affiliated corporations claiming the benefit of a statute which permits them to compute their tax as though they were one. It is true that in either case the bondholder may sell his bonds before maturity, and thus renew his obligation to pay them. But in neither is the taxpayer in a position to require the Government to anticipate an event which may never occur, by conferring upon him the benefit of a deduction to which, without its occurrence, he would not be entitled. Having elected to take the benefit of affiliation, the taxpayer cannot complain of a burden which is inseparable from the benefit and which finds its source in the very method of computing the tax from which the benefit is derived.

2. The privilege of deducting charitable donations from gross income, conferred on individual taxpayers by § 214 (a) of the Revenue Acts of 1921, 1924 and 1926, has not been extended to corporations. A proposal to extend it to them was rejected by Congress pending the passage of the Revenue Act of 1918. Cong. Rec., House, Vol. 56, Part 10, 10426-10428. Section 234 (a) (1) of the Revenue Acts of 1921, 1924 and 1926 authorizes corporations to deduct from gross income "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business." Article 562 of Treasury Regulations 62, interpretative of the 1921 Act, declared that corporations were not entitled to deduct charitable donations. But it recognized

the right to deduct donations "made by a corporation for purposes connected with the operation of its business . . . when limited to charitable institutions, hospitals or educational institutions conducted for the benefit of its employees," and also donations "which legitimately represent a consideration for a benefit flowing directly to the corporation as an incident of its business." These provisions were retained, without substantial change, in the regulations promulgated under the 1924, 1926 and 1928 Acts. Art. 562 of T. R. 65, 69; Art. 262 of T. R. 74. As § 234 (a) (1) to which they pertain has been reenacted in several revenue acts, the regulation now has the force of law. *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488, 492; *Massachusetts Mutual Life Insurance Co.* v. *United States*, 288 U. S. 269, 273.

It is a question of fact in each case whether a donation is made to an institution conducted for the benefit of the donor's employees or is consideration for a benefit flowing directly to the donor as an incident of its business. Here the ruling of the Commissioner, that the deduction was not permissible under the statute and regulations, presumably rests upon a correct determination of the facts. *Welch* v. *Helvering*, 290 U. S. 111, 115. The Board of Tax Appeals found that the gifts to the San Francisco Community Chest were apportioned among the charitable organizations of the City and that the gifts of petitioner were made in the belief that "they resulted in good will toward the petitioner and increased its business." But the Board made no finding of any direct benefit to petitioner's employees or business which the regulations contemplate. Nor was there evidence before it to support such a finding. Our review of determinations by the Board is limited to questions of law raised by its findings or its failure to make findings required by the statute. See *Old Colony Trust Co.* v. *Commissioner*, 279 U. S. 716, 728; *Phillips* v. *Commissioner*, 283 U. S. 589, 599, 600. Compare *Kendrick Coal & Dock Co.* v. *Commissioner*, 29 F. (2d) 559, 564 (C. C. A. 8th); *Commissioner* v. *Langwell Real Estate Corp.*, 47 F. (2d) 841, 842 (C. C. A. 7th).

Affirmed.

Mr. Justice Butler and Mr. Justice Roberts think that so much of the judgment as sanctions the Commissioner's refusal to deduct the bond discount should be reversed.